IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1977

* * * * * *

No. ~~77-1225~~

* * * * * *

DOUGLAS SEIDEL, Petitioner,
v.
THE STATE OF TEXAS, Respondent.

* * * * * *

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

* * * * * *

LAW OFFICES OF BENNIE BOCK, II
Bennie Bock, II
R. Bruce Boyer
340 North Seguin
New Braunfels, Texas 78130
512/625-7574

OF COUNSEL:
Gerald H. Goldstein
LEVEY AND GOLDSTEIN
29th Floor
Tower Life Building
San Antonio, Texas 78205
512/226-1463

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1977

* * * * * *

No. _____

* * * * * *

DOUGLAS SEIDEL, Petitioner,
v.
THE STATE OF TEXAS, Respondent.

* * * * * *

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

* * * * * *

LAW OFFICES OF BENNIE BOCK, II
Bennie Bock, II
R. Bruce Boyer
340 North Seguin
New Braunfels, Texas 78130
512/625-7574

OF COUNSEL:
Gerald H. Goldstein
LEVEY AND GOLDSTEIN
29th Floor
Tower Life Building
San Antonio, Texas 78205
512/226-1463

INDEX

CITATIONS

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1977

No. _____

DOUGLAS SEIDEL, Petitioner,
v.
THE STATE OF TEXAS, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

The petitioner, DOUGLAS SEIDEL, prays for a writ of certiorari issue to review the opinion and judgment of the Criminal Court of Appeals of the State of Texas rendered in these proceedings on November 2, 1977.

OPINIONS BELOW

The opinion of the Criminal Court of Appeals, as yet unreported, appears at Appendix "A", *infra*, Page 10. No formal opinion was rendered by the District Court of Comal County, Texas.

JURISDICTION

The judgment of the Court of Criminal Appeals of the State of Texas was entered on November 2, 1977. See Appendix "A", Page 10, *infra*. A timely petition for rehearing was denied on December 7, 1977, and this petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1257(3).

QUESTIONS PRESENTED

1. Whether evidence obtained by a police officer in a body search of the petitioner, without the benefit of an

arrest or search warrant and not incident to a lawful arrest, was obtained in violation of his rights under the Fourth Amendment to the United States Constitution as applied to the states by the Fourteenth Amendment to the United States Constitution.

2. Whether, if the evidence was unlawfully obtained, it was admissible in the state prosecution of the petitioner.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment IV:

> "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probably cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Constitution of the United States, Amendment XIV, Section 1:

> ". . . nor shall any state deprive any person of life, liberty, or property without due process of law. . ."

STATEMENT OF FACTS

The petitioner, DOUGLAS SEIDEL, was arrested on the 6th day of January, 1974. On the 2nd day of January, 1975, hearing was held on the petitioner's Motion to Suppress Evidence on the grounds that such evidence was obtained in violation of the Fourth Amendment to the United States Constitution. The trial court denied the motion. On the 7th day of September, 1976, petitioner was found guilty of possession of lysergic acid diethylamide and sentenced to two years imprisonment, probated. Petitioner filed an appeal to the Texas Court of Criminal Appeals on the 15th day of October, 1976. A per curiam decision affirming the judgment of the trial court was delivered by the Texas Court of Criminal

Appeals on November 2, 1977. A timely motion for rehearing was filed, such motion being denied on the 7th of December, 1977.

THE INCIDENT OF ARREST

On January 6, 1974, petitioner was arrested for possession of lysergic acid diethylamide. The arrest occurred during a routine surveillance maintained by Detective Steve Hollingshead of the New Braunfels, Texas, Police Department. The officer had observed "unusual activity" in front of the Blue Room, a New Braunfels lounge. At the time of the arrest, petitioner was standing on the public sidewalk outside of the lounge.

Detective Hollingshead testified that upon observing a group of people near the door of the lounge making gestures indicating that exchanges of objects were taking place, he approached the group. Petitioner was not observed participating in this "unusual activity." As the officer approached the group of people at the door of the lounge, the petitioner made a movement towards his mouth with his hand. Detective Hollingshead testified that he had not observed any object in the petitioner's hand, and had never seen or known petitioner before that day.

At this point, the officer, in plain clothes, rushed the petitioner, grabbed him by the throat, choking him, and with the assistance of another officer who had arrived at the scene, extracted a piece of paper from within the petitioner's mouth, wrenching his mouth open.

Detective Hollingshead further testified that the Blue Room had a reputation among local law enforcement officers as being a location where narcotics transactions had taken place. In substance, petitioner was subjected to a physical search of his oral cavity because he made a movement towards his mouth with his hand while he was standing on a public sidewalk outside of an

establishment which had in the past allegedly been a site of narcotics transactions.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW DIRECTLY CONFLICTS WITH THE DUE PROCESS PRINCIPALS ENUNCIATED IN THIS COURT'S *ROCHIN* RULING.

In *Rochin v. The People of California*, 342, U.S. 165, this Court held that the due process requirements of the Fourteenth Amendment were violated where law enforcement officers forcibly attempted to extract matter which the accused had swallowed. The officers attempted to extract capsules from the accused's mouth. Failing in this attempt, they required a physician to induce vomiting in order to extract the capsules. The Court characterized the conduct by the officers in that case as follows:

> ". . . We are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious sqeamishness or private sentimentalism about combating crime too energetically. This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach contents . . . these are methods too close to the rack and screw to permit of constitutional differentiation." 342 U.S., at 172.

The *Rochin* case does establish that a particular search and seizure may be unreasonable or unlawful because of the manner in which or the extent to which it is carried out. Before arrest, the petitioner in the case at bar was physically accosted, choked and subjected to having another person's hand placed in his mouth. Such conduct is not unlike that of the officers in the *Rochin* case.

Furthermore, the search of the petitioner, DOUGLAS SEIDEL, was founded on less justification than that in the *Rochin* case. There, the officers had information that the particular defendant was selling narcotics. The officers had seen the capsules as the defendent placed them in his mouth. In the instant case, the officers had no information pertaining to the petitioner and did not know his identity. Indeed, they had never seen him previous to the date of arrest. He was not a "police character". They did not see any matter in the petitioner's possession.

In short, the petitioner herein was subjected to the type of law enforcement conduct which this Court, in the *Rochin* case, sought to proscribe.

2. THE DECISION BELOW CONFLICTS WITH THE APPLICATION OF THE DUE PROCESS PRINCIPALS ENUNCIATED IN THIS COURT'S *SIBRON* AND *TERRY* RULINGS.

In *Sibron v. New York*, 392 U.S. 40, this Court held that a search for narcotics on the defendant's person could not be based upon the inference that persons who engage in conversations with persons known to be narcotics addicts are engaged in narcotics traffic. This Court stated that such an inference

> ". . . is simply not the sort of reasonable inference required to support an intrusion by the police upon an individual's personal security." 392 U.S., at 62.

The justification given by the officer in the case at bar is not dissimilar. As in the *Sibron* case, the officer was not acquainted with Seidel and had no information pertaining to him. Officer Hollingshead based his inference upon the fact that the petitioner was standing on the public sidewalk outside of an establishment which had an alleged reputation among local police officers as being a site for narcotics trafficking. There was no arrest prior to the search and no evidence that the officers

considered Seidel to be armed and dangerous. Thus, the search of the petitioner was founded on less information pertaining to the particular individuals than the officer had in the *Sibron* case. In light of that decision, the search cannot be justified.

In *Terry v. Ohio*, 392 U.S. 1, this Court enunciated the standard upon which the reasonableness of police searches without a warrant or incident to a lawful arrest are to be judged:

> ". . . Would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" 392 U.S., at 21-22.

In Footnote Number 18 to that opinion, the standard was characterized as a "demand for specificity." If the facts in the *Terry* case are the indication of what level of specificity is required, the decision in the case at bar should be reversed.

In the *Terry* case, the officer approached the defendant and his companions after he had observed their "suspicious activity." Thus, the officer's inference or suspicion that a crime was being committed or about to be committed was based upon direct observations of the defendant.

Officer Hollingshead testified that at the time he approached the petitioner, he had no idea he was going to make an arrest of him. There was no probable cause for an arrest. Furthermore, he had no idea what to expect or what he was seeking in conducting the search. The specific facts he relied upon in his decision to search the petitioner were that Mr. Seidel was standing on a public sidewalk outside of an establishment which had an alleged reputation of ill-repute; and that upon being approached by an individual unknown to him and out of uniform, the petitioner was surprised and made a gesture to his mouth. Officer Hollingshead admitted in testimony

that the petitioner could have been putting a Life Saver in his mouth.

This Court asked in *Terry* "whether the officer's action was justified at its inception", 392 U.S. 1, at 20. None of the specific facts of the *Terry* case were present here. There were no facts to indicate that the petitioner had been engaging in "suspicious conduct" or that he was armed and dangerous. Clearly, the officer's action against the petitioner was not authorized by the court's decision in the *Terry* case.

3. THIS CASE IS ONE OF THE FIRST IMPRESSION FOR THIS COURT.

The facts presented in this case are not totally congruent with any previous "search and seizure" case decided by this Court. By considering and ruling upon this case, this Court may set necessary guidelines by which individuals and police officers may conduct their everyday lives

In *Camera v. Municipal Court*, 387, U.S. 523, this Court stated that there is:

> ". . . no ready test for determining reasonableness other than by balancing the need to search against the invasion which one search entails." at 534-535, 536-537.

The petitioner was subjected to a brutal, painful, and humiliating attack by a police officer. Under the balancing test of *Camera*, this police action cannot be justified.

Every individual's expectations of freedom from police intrusion are based upon the determinations which this Court makes with regard to particular fact situations. If the decision of the court below is allowed to stand, unreviewed, any individual who walks a public street in unfamiliar surroundings may be subjected to such brutal police action. Only the Supreme Court can determine

whether or not such action by the police is to be tolerated.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Texas Criminal Court of Appeals

Respectfully submitted,

LAW OFFICES OF BENNIE BOCK, II
Bennie Bock, II
R. Bruce Boyer
340 North Seguin
New Braunfels, Texas 78130
512/625-7574

OF COUNSEL:
Gerald H. Goldstein
LEVEY AND GOLDSTEIN
29th Floor
Tower Life Building
San Antonio, Texas 78205
512/226-1463

CERTIFICATE

I hereby certify that on this 1st day of March, 1978, three copies each of the Petition for Writ of Certiorari were mailed, postage prepaid, to William L. Schroeder, District Attorney, Comal County Courthouse, New Braunfels, Texas, and to the Prosecuting Attorney for the State of Texas, Supreme Court Building, Room A-101, Austin, Texas, Counsel for the Respondent. I further certify that all parties required to be served have been served.

Bennie Bock II

BENNIE BOCK, II
New Braunfels, Texas 78130
512/625-7574
COUNSEL FOR PETITIONER

THE STATE OF TEXAS
COUNTY OF COMAL

BEFORE ME, the undersigned authority, on this day personally appeared BENNIE BOCK, II, known to me to be the person whose name is subscribed above, and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this 1st day of March, 1978.

Beverly Willmann

Notary Public in and for Comal
County, Texas
My commissions expires 5-9-79

APPENDIX A

DOUGLAS SEIDEL, Appellant
No. 55,936 v. —Appeal from Comal County
THE STATE OF TEXAS, Appellee

OPINION

This is an appeal from a conviction for the possession of lysergic acid diethylamide, the punishment is imprisonment for 2 years, probated.

The appellant asserts that: (1) the court erred in overruling a pretrial motion to suppress and in admitting evidence which was unlawfully obtained in violation of his constitutional rights (2) the court erred in admitting in evidence the "alleged substance" because a proper chain of custody was not shown; and (3) " . . . the evidence was insufficient to prove the knowledge and conjunctive intent of the appellant with the alleged offense."

On hearing of the motion to suppress and during the trial before the court Detective Steven Hollingshead, a New Braunfels city police officer, testified concerning the obtaining of lysergic acid diethylamide from the appellant. Hollingshead observed unusual activity of people standing in front of the Blue Room, a lounge in New Braunfels. He saw a Latin-American male appearing to exchange something for money near the door. Hollingshead knew that in the past several arrests relating to narcotics offenses had been made at the Blue Room and that that establishment had a reputation among law enforcement officers for being a place where there was traffic in drugs. Hollingshead maintained a surveillance with binoculars for a few minutes and came to the conclusion that drugs were being exchanged for money by the people in front of the Blue Room. He saw people making furtive gestures and appearing to get

something from the Latin-American male who received the money from them. Hollingshead, who was not in uniform, called for help and then walked toward the group in front of the Blue Room. As Hollingshead came toward the group he noticed the strong smell of marijuana. The appellant was watching a police sergeant who was also approaching the group. Hollingshead identified himself to the appellant as a police officer. The appellant used foul language towards Hollingshead, rapidly placed something in his mouth, attempted to swallow it, and jumped back toward the building. Hollingshead grabbed the appellant by the throat and with the help of Sergeant Domingo Herrera Hollingshead took from the appellant's mouth a small piece of paper which had a blue dot on it. Hollingshead placed his initials and the date on the small piece of paper and later placed it in an envelope which he marked, dated, and sealed.

Hollingshead gave the envelope to Officer James Pugh. Pugh testified that he received the envelope from Hollingshead and delivered it to the Department of Public Safety Crime Laboratory in Austin. At the trial Hollingshead identified the small piece of paper as the one he took from the apellant and also identified the envelope in which he had placed the paper. Glen Harrison, a chemist for the Department of Public Safety, identified the envelope that Hollingshead and Pugh had also identified; Harrison said he saw Pugh deliver the envelope to George Taft, another chemist for the Department of Public Safety. Chemist Harrison's chemical analysis revealed that the paper with the blue dot contained lysergic acid diethylamide.

Officer Hollingshead had personal knowledge that arrests for narcotic offenses had been made at the Blue Room and he knew of the establishment's reputation for

being a place where there was drug traffic. His experience as an officer led him to believe that the unusual activity which he had observed was evidence that traffic in drugs was being carried on at the time. As he approached to investigate, the actions of the appellant were sufficient to give the officer the right to obtain the evidence which it appeared the appellant was trying to destroy by swallowing. The force used to obtain the piece of paper from the appellant's mouth was not unreasonable. see Donely v. state, 435 S.W. 2d 518 (Tex. Cr. App. 1969); Hernandez v. State, 548 S.W. 2d 904 (Tex.Cr.App. 1977). The court did not err in overruling the motion to suppress and in admitting the evidence at trial. See McLeod v. State, 450 S.W. 2d 321 (Tex.Cr. App. 1970).

The chemist identified the small piece of paper from which he extracted lysergic acid diethylamide. The same piece of paper was identified by Hollingshead as the one he had taken from the appellant, dated and initialed. This with the other evidence which has already been summarized, is proof of the proper chain of custody and the evidence was properly admitted. There was no trial objection that a proper chain of custody had not been proved. This ground of error is overruled. See Salinas v. State, 542 S.W. 2d 864 (Tex.Cr.App. 1976); Hicks v. State, 545 S.W.2d 805 (Tex.Cr.App. 1977); Salinas v. State, 507 S.W.2d 730 (Tex.Cr.App. 1974).

The evidence summarized shows the appellant possessed the small piece of paper and that he was attempting to destroy such evidence when he saw the police sergeant approaching and when he was informed that Hollingshead was a police officer. The evidence is sufficient to establish that the appellant knowingly and intentionally possessed the lysergic acid diethylamide.

A docket entry and the transcription of the court reporter's notes show that the appellant entered a plea of

not guilty before the court. The judgment and the judgment nunc pro tunc both erroneously recite that the appellant entered a plea of guily. The judgment is ordered corrected and reformed to show the appellant entered a plea of not guilty.

The judgment, as reformed, is affirmed.

PER CURIAM

(Delivered November 2, 1977)